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Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6029

ANTHONY LaROCCA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit and its Supplemental Opinion Sur Rehearing (A. 36-54, 57-60) are reported at 587 F.2d 577 (1978). The opinion of the district court (A. 21-34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on rehearing on December 12, 1978. The petition for a writ of certiorari was filed on January 11, 1979. On

June 4, 1979, the petition, together with a motion for leave to proceed in forma pauperis, was granted, and the case was consolidated for oral argument with *Busic v. United States*, No. 78-6020. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. 18 U.S.C. §111 states:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

2. 18 U.S.C. §924(c) states:

"(c) Whoever–

"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

"(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of

imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

QUESTION PRESENTED

Whether a prosecution lies under the general "enhanced penalty" provisions of 18 U.S.C. §924(c)(1) for the use of a firearm in the commission of a felony when the conduct involved is subject to the specific "enhanced penalty" of 18 U.S.C. §111.

STATEMENT OF THE CASE

I

Petitioner Anthony LaRocca, Jr. was tried with Michael Busic on a multi-count indictment alleging drug, firearm, and assault offenses. According to the government's evidence, these charges grew out of a drug conspiracy that turned into an attempt to rob an undercover agent. In early May 1976, the evidence showed, petitioners arranged with Charles Harvey, a policeman on assignment with the Drug Enforcement Administration, to buy with Harvey's funds marijuana and cocaine in Florida for distribution in the Pittsburgh area. A few days later LaRocca asked to see Harvey's

purchase money, and the parties agreed to meet in a shopping center parking lot in Monroeville, Pennsylvania, to enable LaRocca to examine it. (*See* A. 22-23.)

Supported by hidden surveillance units, Harvey showed up with $30,000 in cash. When LaRocca demanded the money at gunpoint, Harvey gave a prearranged signal to the other agents to close in. LaRocca fired several shots without hitting anyone, and was then disarmed. Subsequent searches of Busic and of the automobile used by LaRocca and Busic turned up other weapons. (*See* A. 23-25.)

Busic testified in defense that a government informant had suggested the plan for robbing Harvey by fabricating a drug deal and then had entrapped Busic and LaRocca into participating in the plan. (*See* A. 25.)

II

On the basis of this evidence the jury returned guilty verdicts on almost all counts.[1] Of significance to this petition, LaRocca was convicted of, *inter alia*, (a) two counts of assaulting federal agents "by means and use of a dangerous weapon, that is a semi-automatic pistol," in violation of 18 U.S.C. §111 (Counts 6 and 7) and (b) using this firearm in the commission of these same assaults assertedly in violation of 18 U.S.C. §924(c)(1) (Count 19). (A. 9, 15, 19-20.)[2] LaRocca had previously

[1] Busic was acquitted on Count 17, alleging a separate violation by him of 18 U.S.C. §924(c).

[2] Although Count 19 also alleged that the firearm had been used to commit the drug conspiracies charged in Counts 1 and 2, the jury was permitted to find LaRocca guilty under Count 19 for the use of the pistol solely in assaulting the federal officers. *See* 587 F.2d 577, 584 n.5, 588 n.3, A. 47 n.5, 60 n.3.

been convicted under Section 924(c) in 1973.

The second paragraph of Section 111 provides for an increase in the maximum term of imprisonment for assaulting a federal officer from three to ten years in cases in which a dangerous weapon is used. Similarly, Section 924(c) provides a mandatory penalty for the use of a firearm in committing a federal felony in addition to the sentence provided for the felony alone; in the case of a second conviction the statute requires imprisonment for not less than two nor more than 25 years, to be served consecutively to the sentence imposed for the felony.

Purporting to exercise authority provided in these sections for enhancing LaRocca's punishment on account of his use of a pistol in assaulting federal officers, the district court sentenced LaRocca to concurrent five-year terms on the assault charges, Counts 6 and 7. In addition, the court imposed a 20-year term under Count 19, to be served consecutively to all other sentences. (A. 19-20.) Thus, LaRocca was convicted and sentenced under the enhanced penalty provisions of two statutes for the identical use of a firearm.[3]

On appeal the court of appeals initially held that this pyramiding of sentences was contrary to the Double Jeopardy Clause, 587 F.2d 577, 580-82, A. 40-43, but, based on this Court's intervening decision in *Simpson v. United States*, 435 U.S. 6 (1978), the court granted

[3] In total, LaRocca was sentenced to 30-years imprisonment. In addition to the 20 years imposed under Count 19, he received (a) concurrent terms of up to five years on the drug counts with a mandatory three-year term of special parole supervision (Counts 1-5) and (b) concurrent terms of five years on the assault and firearm charges to be served consecutively to the sentences on Counts 1 through 5 (Counts 6-13).

rehearing and vacated that portion of its earlier opinion. On the basis of *Simpson* the court then held, as a matter of statutory interpretation, that LaRocca could not be sentenced pursuant to both the enhancement paragraph of Section 111 and Section 924(c). However, the court also concluded that LaRocca could be prosecuted separately under Section 924(c). 587 F.2d at 587-88, A. 58-60. Accordingly, the case was remanded "for resentencing, at which time the government may elect to proceed under either section 924(c)(1) or section 111, but not both." *Id.* at 589, A. 60.

ARGUMENT

Introduction

The government concedes that this Court's recent decision in *Simpson* "unquestionably" prohibits a doubly enhanced sentence of the kind imposed on LaRocca by the district court. U.S. PET. at 7.[4] Although *Simpson* itself addressed only the interaction between Section 924(c) and the bank robbery section of Title 18, 18 U.S.C. §2113, no distinction can be drawn between the enhanced penalty provision of Section 2113 and that of Section 111. As a result, the court of appeals below was plainly correct in ruling that LaRocca could *not* be punished under the enhancement paragraph of Section 111 *and* under Section 924(c). 587 F.2d at 588, A. 59-60. *Accord, United States v.*

[4]"U.S. PET." refers to the government's brief filed on May 11, 1979, in response to the petitions for a writ of certiorari.

Shillingford, 586 F.2d 372, 376 (5th Cir. 1978).[5]

The narrow, but important, question presented here instead is this: Can LaRocca be prosecuted even separately under Section 924(c)? The government maintains that Congress "intended to allow the prosecutor the discretion to charge and the court to sentence under *either* the enhancement provisions included in Section 2113 and 111, *or* the enhancement provision in Section 924(c)." U.S. PET. at 7 (emphasis in original). Most judges who have addressed this contention since *Simp-*

[5]Unlike the case in *United States v. Shillingford, supra*, 586 F.2d at 376 & n.7, there also is no issue here of the government's power to prosecute simultaneously under the first paragraph of Section 111 for simple assault and under Section 924(c) for the use of a firearm in committing the assault. As suggested in *Simpson* itself (435 U.S. at 11-12), such a combination of charges would raise a serious Double Jeopardy issue. *See, e.g., Brown v. Ohio*, 432 U.S. 161 (1977); *Jeffers v. United States*, 432 U.S. 137 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Greene*, 489 F.2d 1145, 1158 (D.C. Cir. 1973). *See also Whalen v. United States*, 441 U.S. 904 (1979), *granting cert. to review* 379 A.2d 1152 (Ct. App. D.C. 1977) (convictions for rape and felony-murder challenged under the Double Jeopardy Clause). Appropriately, the court of appeals specifically directed the government on resentencing to proceed under *either* Section 111 *or* Section 924(c).

Perhaps because of LaRocca's concurrent sentences on counts 6 through 13 (*see* note 3, *supra*), the government has not sought review of this aspect of the judgment below. The question, therefore, is not before the Court in this case. *See, e.g., Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

son was handed down have properly rejected it.[6] *Simpson* itself unequivocally and convincingly holds that Section 924(c) is *not* available for the prosecution of firearm use that is punishable under one of the specific enhancement provisions of the criminal code, like Section 2113 or Section 111. Indeed, the govenment's position in this case is so totally at odds with Simpson that it should be rejected out of hand. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732 (1977) ("considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").[7]

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[6] As of this time, at least 16 federal judges have rejected the government's position. *See Grimes v. United States*, ____ F.2d ____ (2d Cir. No. 79-2007 decided Sept. 6, 1979); *United States v. Vaughan*, 598 F.2d 336 (4th Cir. 1979); *United States v. Roach*, 590 F.2d 181 (5th Cir. 1979); *United States v. Shillingford, supra*, 586 F.2d at 376 (dissenting opinion); *United States v. Stewart*, 585 F.2d 799 (5th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); *United States v. Stewart*, 579 F.2d 356 (5th Cir. 1978); *United States v. Nelson*, 574 F.2d 277 (5th Cir. 1978), *cert. denied*, 439 U.S. 956 (1978); *United States v. Hearst*, 466 F. Supp. 1068, 1072 n.3 (N.D. Cal. 1978). *See also United States v. Girst*, ____ F.2d ____ (D.C. Cir. No. 77-1604 decided March 28, 1979), Slip Op. at 9 (*dictum*); *Broughton v. United States*, 594 F.2d 864 (6th Cir. 1979) (unreported opinion).

To our knowledge, only three members of the Ninth Circuit and two of the Fifth have agreed with the panel below, *see United States v. Brown*, 602 F.2d 909 (9th Cir. 1979); *United States v. Shillingford, supra*, and at least one of these (Judge Coleman) appears to have changed his mind. *See United States v. Roach, supra.*

[7] *Accord, e.g., Runyon v. McCrary*, 427 U.S. 160, 175 (1976). *See also Flood v. Kuhn*, 407 U.S. 258 (1972).

18 U.S.C. §924(c) DOES NOT APPLY TO CONDUCT THAT IS SUBJECT TO THE ENHANCED PENALTY OF 18 U.S.C. §111.

The government candidly admits that "there is language in the Court's opinion in *Simpson* that lends *considerable* credence to petitioner's contention that Section 111 violations can never supply the predicate for a conviction under Section 924(c)(1) . . . ." U.S. PET. at 7 (emphasis added). The government, nonetheless, claims that the reach of Section 924(c) was not actually resolved in *Simpson*. In a similar vein, the court of appeals below read *Simpson* as permitting prosecution of LaRocca under Section 924(c) by seizing on the statement in the Court's opinion (435 U.S. at 16) that "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both §2113(d) and §924(c)." 587 F.2d at 588, A. 59. Yet the government's reconstruction of *Simpson*, accepted by the court below, is patently incorrect.

The quotation relied on by the court of appeals, read in context, was only another way of saying that Simpson could not be prosecuted at all under Section 924(c). The Court in *Simpson* reasoned that the defendant's pyramided sentence was invalid precisely because, as Simpson argued,[8] no conviction can be obtained under Section 924(c) when the enhanced penalty provisions of other sections of Title 18 apply. The actual

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[8] *See* Br. for Petitioners, Nos. 76-5761 and 76-5796, filed June 13, 1977, at 4: "[W]here the statute charging the substantive crime includes a provision which provides a higher penalty for use of a dangerous weapon or firearm, §924(c) is not applicable."

disposition in *Simpson* was to remand for proceedings consistent with the opinion, 435 U.S. at 16, and the opinion specifically reaches:

> "the conclusion that Congress *cannot be said to have authorized* the imposition of the additional penalty of §924(c) for commission of bank robbery with firearms already subject to enhanced punishment under §2113(d)." *Id.* at 12-13 (emphasis added).

Moreover, the opinion is replete with statements to the effect that Section 924(c) is simply "unavailable" for prosecution of firearm use addressed in the enhanced penalty provisions of other sections. *Id.* at 15. Pointedly, the opinion closes by expressly endorsing the original views of the Justice Department on the scope of Section 924(c). As described by the Court, those views called upon:

> "all United States Attorneys *not to prosecute a defendant under §924(c)(1)* where the substantive statute the defendant was charged with violating already 'provid[ed] for increased penalties where a firearm is used in the commission of the offense.' 19 US Attys Bul 63 (U.S. Dept. of Justice 1971)." *Id.* at 16 (emphasis added).[9]

Consistently with the Court's opinion, Simpson's Section 924(c) sentences, in fact, were vacated on remand.[10]

[9]The *Simpson* opinion (435 U.S. at 9, 14) also endorses *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976), *cert. denied*, 429 U.S. 110 (1977), which holds that a crime "for which the penalty is enhanced by use of a dangerous weapon, *cannot form the basis of a prosecution under §924(c)(1).*" *Id.* at 1172 (emphasis added).

[10]A copy of the court of appeals' order on remand is set forth in the Appendix to this brief.

Thus, the government engages in understatement when it confesses that the language of *Simpson* lends "considerable credence" to this petition. The language of that decision provides overwhelming support for petitioner's position, and is hopelessly at odds with the government's views. But it is not merely the language of *Simpson* that dictates the proper result here. The Court's reasoning there sharply limits the reach of Section 924(c). As we show below, the "tools of statutory construction" relied on in *Simpson* (435 U.S. at 12) all demonstrate the inapplicability of Section 924(c) to a case such as this.

A. The Legislative History Demonstrates Congress's Intent To Exclude Section 111 Violations From The Scope Of Section 924(c).

Simpson leaves no room for doubt about the import of the legislative history of Section 924(c). As the Court observed there (435 U.S. at 13), Section 924(c) stems from an amendment to the Gun Control Act of 1968 proposed by Representative Poff on the House floor. 114 Cong. Rec. 22231 (1968). In a statement that must be regarded as the most definitive explanation of this amendment,[11] Representative Poff noted "[f]or the sake of legislative history":

[11]Because the amendment was passed on the same day it was introduced, there is no explanatory statement other than Representative Poff's remarks to elucidate its scope. Thus, the only source to which the members of Congress could have looked in considering this provision for enactment was the statement of its author upon introducing it.

> *"[M]y substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials,* with section 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." *Id.* at 22232 (emphasis added).

The sponsor of Section 924(c) could hardly have made it plainer that the provision does *not* authorize the prosecution of Section 111 violations. In the words of *Simpson* (435 U.S. at 13), Representative Poff's "statement is clearly probative of the legislative judgment that the purpose of §924(c) is already served whenever the substantive federal offense provides enhanced punishment for use of a dangerous weapon." Significantly, when the Justice Department first analyzed Section 924(c), it concluded as much by expressly adopting Representative Poff's statement as official policy.[12]

But this is not all that the legislative history of Section 924(c) shows. The Court also relied in *Simpson* (*id.* at 14) on the fact that the Poff proposal was adopted in Conference Committee in preference to an amendment that Senator Dominick had offered on the Senate floor. *See* H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968). Under that amendment the government would have been permitted to proceed

[12]*See* Letter dated January 13, 1972, from Carl W. Belcher, Chief, General Crimes Section, Criminal Division, to George Beall, United States Attorney, Baltimore, Maryland, *reprinted in* the appendix to the Supplemental Memorandum for the United States, *Simpson v. United States*, Nos. 76-5761 and 76-5796, filed on Nov. 22, 1977, at 2a.

under Section 924(c) even where the use of a firearm was already subject to augmented punishment pursuant to the provisions of the underlying offense. *See* 114 Cong. Rec. 27142 (1968). As Senator Dominick explained, his amendment would not "detract" from Section 2113 or Section 111, but "would be available if the prosecutor and the court desired, for the purpose of stronger penalties in those cases where firearms were involved." *Id.* at 27143. The rejection of this proposal, especially when coupled with Representative Poff's affirmative statement of the scope of Section 924(c), points unmistakably to the conclusion that this provision was meant to be unavailable where existing sections of Title 18 already serve to deter the use of firearms.

If Congress had truly intended, as the government urges, to vest in the prosecution discretion to charge armed robbery or assault under Section 924(c) in place of Section 2113 or Section 111, then surely Congress would have left some evidence of this when it specifically addressed the interplay of these provisions. Yet not one word in the debate on this subject suggests that Congress intended any such result. On the contrary, not only did the author of Section 924(c) state *in haec verbae* that the provision would *not* apply to Section 2113 or 111 violations, but, in enacting Section 924(c), Congress specifically rejected an alternative that would have conferred the very authority now sought by the government. As *Simpson* itself cogently shows, the legislative record thus forecloses the government's argument in this case.

B. The Rule Of Lenity Precludes The Imposition Of An Enhanced Penalty For Armed Assault Under Section 924(c).

The Court's reliance in *Simpson* on the rule of lenity also compels the conclusion that *Simpson* is controlling here. There is simply no way that the government's theory that Section 924(c) permits an election of offenses can be squared with the rule of lenity, as invoked in *Simpson.*

The rule of lenity is, in the words of *Simpson,* an "established rule of construction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of' " the defendant. 435 U.S. at 14, *quoting United States v. Bass,* 404 U.S. 336, 347 (1971); *Rewis v. United States,* 401 U.S. 808 (1971). The rule is "an outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive." 435 U.S. at 15-16.

In *Simpson* there never was any question about the reach of Section 2113; Simpson was unquestionably subject to both subsections (a) and (d) of that statute, prescribing sentences for bank robbery and the use of a dangerous weapon, respectively. The only doubt was whether, in light of the legislative history reviewed above, Section 924(c) also applied. *See* 435 U.S. at 13-15. The Court answered "no," because:

> "[e]ven where the relevant legislative history was not nearly so favorable to the defendant as [here], this Court has steadfastly insisted that '*doubt will be resolved against turning a single transaction into multiple offenses.*' " *Id.* at 15 (emphasis added), *quoting Bell v. United States,* 349 U.S. 81, 84 (1955).[13]

As followed in *Simpson,* the rule of lenity thus reinforced the conclusion to which the legislative history pointed: Simpson could not be convicted or punished under Section 924(c), since that section does not apply to a felony that already is subject to an enhanced penalty if committed with a firearm. The same conclusion must be reached with respect to LaRocca, for the basic ambiguity, to be resolved under the rule of lenity, is exactly the same in this case as in *Simpson.*

Indeed, the government's position here would require the Court to conclude that Congress has authorized multiple convictions and punishments for a single criminal transaction, even though the government now acknowledges that prosecutions under both the enhancement provisions of Section 2113 or Section 111 and Section 924(c) are impermissible. Under the government's theory nothing in the statutes would stand in the way of prosecuting an armed assault by combining a Section 924(c) charge with a Section 111 count for simple assault. As is the case for convictions under Section 2113(a) and (d),[14] a conviction for simple assault under the first paragraph of Section 111 would merge as a lesser included offense into a conviction for assault with a dangerous weapon under the enhancement paragraph of that provision. But convictions under the first paragraph of Section 111 and under Section 924(c) would stand independently, since Section 924(c) on its face contemplates a separate sentence for the underlying felony.[15]

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[13] *See also, e.g., Ladner v. Untited States,* 358 U.S. 169 (1958); *Prince v. United States,* 352 U.S. 322 (1957); *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218 (1952).

[14] *See, e.g., Grimes v. United States, supra,* Slip Op. at 4642-50, and cases cited therein.

Thus, if the government's views are followed, it would be free to obtain two convictions in the case of armed assault by invoking Sections 111 and 924(c), when prosecution under Section 111 alone could result at most in one![16] It would require utter disregard of significant portions of the Congressional Record to conclude that Congress has issued, in the words of *Simpson* (435 U.S. at 15), a "clear and definite" directive authorizing this result.

Analysis of the severity of the sentencing provisions of these sections points in the same direction. Not only would application of Section 924(c) to an armed assault of a federal officer establish a mandatory minimum sentence of one or two years imprisonment where previously there had been none. It would also enlarge the maximum total sentence from ten to as much as 13 or 28 years.[17]

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[15]*See also, e.g.,* 114 Cong. Rec. 22231 (1968) (remarks of Representative Poff): "My substitute makes it a separate Federal crime to use a firearm in the commission of another Federal crime and invokes separate and supplemental penalties."

[16]This is not to say that a combination of Section 111 and Section 924(c) charges would pass muster under the Double Jeopardy Clause (*see* note 5, *supra*), only that the government's position requires the conclusion that Congress intended, in adopting Section 924(c), to make what had previously been one crime under Section 111 into two.

[17]The use of a gun in assaulting a federal officer increases the maximum term of imprisonment under Section 111 from three to ten years. Section 924(c) by its terms exposes a first offender to a one-to-ten year sentence and a recividist to a two-to-25 year sentence, on top of the sentence for the underlying felony.

Even if the Double Jeopardy Clause bars simultaneous prosecution under Sections 111 and 924(c), application of Section 924(c) alone to armed assault, of course, would more than double the maximum potential sentence from ten to 25 years in the case of a second offender.

In short, the government's position would increase as well as multiply punishments by resolving ambiguity regarding the application of Section 924(c) *against* the defendant. As in *Simpson*, the rule of lenity precludes this result.

C. Section 111 Takes Precedence Over Section 924(c) Because A Specific Criminal Statute Governs Over A General One.

The last "tool of statutory construction" relied on in *Simpson* also shows that Section 924(c) does not apply to any Section 111 violations. The Court in *Simpson* expressly invoked "the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later." 435 U.S. at 15. Because this doctrine calls for application of the specific statute *in place of* the general one, its mere invocation in *Simpson* completely undermines the government's present position. The principle dictates that armed robbery or assault be prosecuted pursuant to the specific terms of Section 2113 or Section 111 and not the general ones of Section 924(c).

As noted in *Simpson*, the Justice Department originally "found the interpretative preference for specific criminal statutes over general criminal statutes *of itself* sufficient reason to advise all United States Attorneys not to prosecute a defendant under §924(c)(1)" in the case of a Section 2113 or Section 111 violation. 435 U.S. at 16 (emphasis added). In an about-face the Department now suggests that this preference "arguably" calls for application of Section 924(c) rather than

Section 2113 or Section 111, because the former assertedly focuses more specifically on the use of firearms. U.S. PET. at 9 n.6. The diffidence with which this argument is advanced is appropriate because the argument is fundamentally misconceived.

To begin with, there is no substance to the government's suggestion that Section 924(c) speaks more specifically than Section 2113 or Section 111 to the use of guns as opposed to other weapons. As explained in *Simpson* (435 U.S. at 10 n.4), although Section 924(c) focuses on combating the use of guns, the provision applies more broadly to the use of "any destructive device," including bombs, grenades, and similar devices. *See* 18 U.S.C. §§921(a)(3)(D) and 4(A) (defining "firearm" and "destructive device," respectively). Moreover, Congress undoubtedly considered the use of guns the principal evil when it provided enhanced penalties for the use of a deadly or dangerous weapon in assaulting a federal officer or robbing a bank.[18]

Furthermore, even if the government's description of Section 924(c) were persuasive, that would *not* support its contention that this section contemplates an election of punishments in cases where the enhancement provisions of other sections apply. If the government were

[18]*See* 435 U.S. at 10 n.4 (reviewing the legislative history of Section 2113); Letter dated Jan. 3, 1934, from the Attorney General to the Chairman of the House and Senate Committees on the Judiciary, *reprinted in* H.R. Rep. No. 1455, 73d Cong., 2d Sess. 2 (1934), and S. Rep. No. 535, 73d Cong., 2d Sess. 1-2 (1934) (sponsoring the predecessor of Section 111 based on the "shooting" and "serious wounding" of the warden of the Federal Penitentiary at Leavenworth).

correct, Section 924(c) would govern *to the exclusion of* Sections 2113(d) and 111 – a result patently at adds not only with *Simpson*, but with the government's own position and common sense. No one, including the government, has ever suggested that the enhancement provisions of Section 2113(d) and 111 do not apply according to their terms.[19] Thus, no matter how the doctrine is applied, the Court's reliance in *Simpson* on the interpretative preference for specific statutes simply forecloses the government's theory of a prosecutorial election.

Finally, this principle of construction looks functionally to the pertinent legislative objectives and directs that the provisions most attuned to those objectives be given precedence. The more specific statute controls even over a later enacted one because it is presumed to strike more precisely the balance intended by Congress among competing goals. Here the legislative purposes are the appropriate deterrence and punishment of the use of weapons, and *Simpson* soundly holds that the provisions most in harmony with these objectives are the sections of the criminal code cited by Representative Poff, not Section 924(c).

[19]These specific enhancement provisions would not apply if they have been impliedly repealed by the enactment of Section 924(c). Yet it is "a cardinal principle of statutory construction that repeals by implication are not favored," especially "when we are urged to find that a specific statute has been repealed by a more general one." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). *See also, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). In this case the legislative history of Section 924(c) affirmatively disproves any such repeal.

Section 924(c), after all, applies generally to the use of firearms in the commission of *any* federal felony. As the scope of sentencing discretion thereunder illustrates (one-to-ten years imprisonment for a first offender, or two-to-25 for a recidivist), Congress could not in a statute so broad prescribe exact punishments appropriate for each violation that might arise. In contrast, the provisions cited by Representative Poff focus more narrowly on the use of weapons in the context of specific crimes. This added variable enabled Congress to tailor sentencing discretion more precisely to the conduct to be deterred and punished than was the case with Section 924(c).

For example, 18 U.S.C. §§111, 112, and 2231 provide a maximum ten-year prison sentence for armed assault of federal officers, foreign diplomatic personnel, and officers executing search warrants, respectively. Section 113 of Title 18, however, which addresses the somewhat less serious problem of assaults within the maritime and territorial jurisdiction of the United States, authorizes a maximum prison term of only five years for assault with a dangerous weapon. On the other hand, 18 U.S.C. §2113 provides for up to 25 years imprisonment for armed bank robbery, while 18 U.S.C. §2114 imposes a mandatory 25-year sentence for armed robbery of a postal employee. Obviously, Congress has carefully graded the potential penalties for the use of a weapon in violation of these provisions according to the nature of the crime and the threat posed to the interests of the United States.[20] To allow

[20]Significantly, all of these sections antedate the codification of Title 18 in 1948, so that all of them were reviewed for "disparities in punishments" at that time. H.R. Rep. 304, 80th Cong., 1st Sess. 7 (1947).

sentencing power under Section 924(c) to displace these provisions would enable the government to alter the maximum penalties that Congress clearly meant to govern when it focused specifically on the use of weapons in the context of these specific crimes.[21]

In sum, like the legislative history of Section 924(c) and the rule of lenity, the interpretative preference for specific criminal statutes demonstrates that the path of decision in this case has already been charted. The Court's decision in *Simpson* is dispositive here not only in the language, but in the reasoning that it employs. The government's efforts now to obtain a change in this decision are more appropriately directed to the Congress than to this Court.

[21]Moreover, the government's theory would create anomalies that Congress could not have intended between the penalties available to punish the use of a firearm and those available to punish the use of another type of dangerous weapon. For example, a person using a knife to rob a postal employee would face a mandatory 25-year sentence under Section 2114, while his counterpart with a pistol could be let off with a mere one- to two-year sentence if prosecuted pursuant to Sections 2114 and 924(c).

Similarly, a first offender using a knife to commit grand larceny in a bank could be sentenced up to 25 years under Section 2113(d), but would face at most a 20-year sentence if he used a gun and was charged under Sections 2113(b) and 924(c). Indeed, if the Double Jeopardy Clause prohibits simultaneous prosecution under these provisions (*see* note 5, *supra*), application of Section 924(c) would effectively reduce the maximum penalty in this example even further to merely ten years imprisonment.

CONCLUSION

For the foregoing reasons, the judgment on rehearing of the court of appeals should be reversed, and the case remanded with instructions to vacate the conviction and sentence against petitioner under Count 19.

Respectfully submitted,

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Hughes Hubbard & Reed
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Of Counsel:
PETER E. SCHEER

APPENDIX

Nos. 76-1459, -1460, -1465, -1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee vs *Nos. 76-1459 & -1466*	:	
MICHAEL LEE SIMPSON, Defendant-Appellant	:	
	:	ORDER
UNITED STATES OF AMERICA, Plaintiff-Appellee vs *Nos. 76-1460 & -1465*	:	
TOMMY WAYNE SIMPSON, Defendant-Appellant	:	

Before WEICK, PECK and ENGLE, Circuit Judges.

The Supreme Court having reversed the judgment of this Court in the above-numbered appeals and remanded to us for further proceedings in conformity with the opinion of said Court,

It is ORDERED that the sentences imposed upon the appellant by the District Court for violations of 18 U.S.C. §924(c) be and they are hereby vacated, and the consecutive sentences imposed by the District Court for violations of 18 U.S.C. §2113(d) are hereby approved and affirmed.

The appeals are remanded to the District Court for compliance with this Order.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Eastern District of Kentucky
FILED
APR 19 1978
AT LEXINGTON
DAVIS T. McGARVEY
CLERK, U.S. DISTRICT COURT